

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: FIRSTENERGY CORP. CIVIL ACTION NO.
SECURITIES LITIGATION 2:20-cv-3785

THIS DOCUMENT RELATES TO:
ALL ACTIONS.

TRANSCRIPT OF REMOTE PROCEEDINGS
BEFORE SPECIAL MASTER SHAWN JUDGE
THURSDAY, JANUARY 4, 2024

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I N D E X

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(None)

EXHIBITS

NUMBER	MARKED AND RECEIVED
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(None)

1 REPORTED REMOTELY FROM IRVINE, CALIFORNIA;

2 THURSDAY, JANUARY 4, 2024, 8:04 A.M. TO 9:43 A.M.

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4 SPECIAL MASTER JUDGE: It is January 4th, 2024,
5 11:05. We're here in the FirstEnergy case,
6 2:20-cv-3785; as well as the MFS Series Trust I
7 litigation, Case No. 221-cv-5839; and Brighthouse Funds
8 Trust II litigation, Case No. 2:22-cv-865, before the
9 Special Master by reference for report and
10 recommendation as to motion for a stay pending the
11 interlocutory 26(f) appeal. The motion for a stay is by
12 FirstEnergy.

13 Counsel, if you would introduce yourselves and
14 then move into it. The floor will be yours.

15 MR. GIUFFRA: Okay. Good morning, Special
16 Master Judge. Robert Giuffra with Sullivan & Cromwell
17 for the Defendants.

18 MR. FORGE: Good morning. This is Jason Forge
19 for the Class Plaintiffs.

20 MR. HEIMANN: And good morning, your Honor.
21 Richard Heimann for the Opt-Out or Direct Action
22 Plaintiffs.

23 SPECIAL MASTER JUDGE: Thank you, all, and
24 welcome.

25 Mr. Giuffra, whenever you're ready.

1 MR. GIUFFRA: Okay. Mr. Judge, as I think it's
2 been laid out in the papers fairly well, the grant of a
3 23(f) interlocutory appeal is a significant step in any
4 securities case. In fact, it's a rare step. And that's
5 Plaintiffs' own words in opposing the grant in this
6 case.

7 Now, we went back and looked, and the Sixth
8 Circuit has granted 23(f) appeal and securities cases
9 four times in the last ten years, including in this
10 case.

11 In the three other cases, besides this case,
12 District Courts granted stays of those cases, including
13 Magistrate Judge Jolson, because of the significant
14 implications of a 23(f) appeal.

15 Now, it's quite clear that the 23(f) appeal in
16 this case could significantly change the shape of the
17 case. We provided you with copies of our petition, the
18 opposition briefs, the reply, as well as the amicus
19 briefs that were filed by prominent law professors and
20 SEC officials.

21 There are two claims in this case. The most
22 significant claim, clearly, is the Section 10(b) fraud
23 claim the Plaintiffs had brought under the Exchange Act
24 on behalf of stockholders in FirstEnergy. The Court
25 certified a class for three-and-a-half years and

1 Plaintiffs claim approximately \$8 billion in losses over
2 that three-and-a-half-year class period.

3 The other claim that remains in the case is a
4 Section 11/Section 12 case under the Securities Act and
5 it's on behalf of bondholders. That claim has
6 completely different standards that need to be shown.
7 For example, you've got to show scienter in a 10(b)
8 case. No scienter obligation in a bondholder
9 Section 11/Section 12 case, just a material
10 misstatement.

11 The class period in the bondholder case is
12 only -- is less than a year, and the losses are, at
13 most, about \$200 million.

14 Now, the 23(f) petition goes directly at the
15 10(b) case, the 10(b) claims. And that's, again, if
16 the -- if the Sixth Circuit rules the way we think it
17 should, as laid out in our petition, there won't be a
18 10 -- a Section 10(b) case in this case. It'll be
19 dismissed. Well, there'll be no class that will be
20 certified.

21 They may get the chance to remand back to the
22 District Court, try to file another class certification
23 motion. There have been other cases we've been involved
24 in with Mr. Forge's firm. This has gone on literally
25 three times.

1 But there may not be a certifiable 10(b) case
2 following the motion that we have made -- the
3 application we have made. And with a 10(b) case, the
4 Plaintiffs have to prove class-wide reliance. They've
5 got to show that all of the stockholders in the class
6 relied upon the alleged misstatements or omissions.

7 Now, in order to establish reliance in a
8 securities case, the Supreme Court has adopted two
9 presumptions. One is something called Affiliated Ute,
10 which we talk about in our papers, and the other is
11 Basic.

12 In most securities cases involving public
13 companies -- in fact, all that I'm aware of -- Courts
14 rely upon the Basic presumption.

15 Now, here Plaintiffs have alleged -- and I was
16 glad that Mr. Forge put the brief in front of -- put it
17 before you -- the complaint before you last night. They
18 principally allege that Defendants did not disclose they
19 were engaged in a political corruption scheme.

20 They also allege approximately 42 -- I think it
21 is 42 -- misstatements and they -- those statements --
22 you know, is a different case. You don't have to rely
23 upon Basic.

24 Now, it's a lot easier to establish and to
25 certify a class based on Affiliated Ute than under

1 Basic. There are different standards, and those
2 standards are much harder to -- to meet.

3 Now, we've raised both the question of whether
4 Plaintiffs can rely upon Affiliated Ute and Basic in
5 certifying a class in this case and whether they can
6 have a claim that's based on the nondisclosure of this
7 alleged political corruption scheme. We don't think
8 they can do that. Seven Courts of Appeals have gone our
9 way. The Sixth Circuit has not addressed this issue at
10 all. In fact, there have been -- you know, there have
11 been cases where the Sixth Circuit, prior to this case,
12 had denied 23(f) petitions in securities cases seeking
13 review of this question of whether Affiliated Ute and
14 Basic can be applied in the same case.

15 Chief Judge Marbley, in his class certification
16 order, recognized that this was a question that had not
17 been decided by the Sixth Circuit and it's an important
18 legal question. And clearly, the Sixth Circuit, you
19 know, is going to review that issue.

20 The second issue that we presented in our
21 petition is equally important and perhaps more so. The
22 Supreme Court in the case called Comcast -- it's a
23 relatively recent Supreme Court case -- said that
24 Plaintiffs must be able to propose a damages methodology
25 that is capable of measuring damages on a class-wide

1 basis.

2 One of the issues in this case is that, over
3 the three-and-half years, if you just look at the 42
4 misstatements, different misstatements were made at
5 different times. And what the misstatement was or
6 wasn't had different effects. Because when you're
7 dealing with something -- you know, in the typical
8 securities case, if a company says, well, we're going to
9 have, you know, a billion dollars in earnings and they
10 announce that the stock price goes up, and then it turns
11 out that it was a bankrupt company and the stock price
12 goes down, it's pretty easy to assess what the impact
13 was of the misstatement.

14 In a case like this, when Plaintiffs are
15 relying upon statements like "we endeavor to comply with
16 the law" and the issue is, well, you didn't disclose you
17 were engaged in purported corruption conduct at various
18 points in time. Obviously, what was going on at
19 different points time was -- were different.

20 So, for example, if you just take the facts of
21 this case, the fact that, you know, FirstEnergy was
22 providing political contributions to Mr. Householder
23 before he became a speaker of the -- of the Ohio house,
24 was, obviously, something that would have had less of an
25 impact on the stock price than, for example, if he was

1 the speaker, which happened later on, or if HB6 was
2 passed or if the repeal was going to happen.

3 So the inflation in FirstEnergy's stock price
4 was different, varying over the course of the
5 three-and-a-half-year class period. And the statements
6 themselves were what I would call qualitative
7 misstatements; meaning, they weren't statements going to
8 financial metrics, but they were going to statements
9 about what the company was endeavoring to do in terms of
10 things like legal compliance.

11 And trying to measure the amount of inflation
12 in the stock price because of such qualitative
13 statements in the context of an alleged political
14 corruption scheme over three-and-a-half years is quite
15 different than being able to, in a financial
16 misstatement case, look at, well, what was the statement
17 that was made with respect to earnings? The stock price
18 went up ten points. Then it turned out the earnings
19 were not going to be hit, stock price went down ten
20 points. That's a much simpler methodological problem
21 for a damages expert.

22 Now, in this particular case, what happened was
23 the Plaintiffs submitted what we call a cookie-cutter
24 expert report from another case where, in fact, I
25 believe that the class cert wasn't even -- it -- there

1 were issues with respect to class cert in that case,
2 where the expert basically identified a series of
3 methodologies that could be used to measure damages in a
4 securities case.

5 The expert didn't attempt to propose a
6 methodology that would apply in this case. They didn't
7 even pick a particular methodology that he would apply.
8 Now, he promised, at some point down the road, he could
9 do so. Now, Chief Judge Marbley in his decision, did
10 not apply Comcast. He didn't engage in the rigorous
11 analysis that was required by Comcast. And instead he
12 thought that, well, since, under the Securities Act,
13 there was a statutory formula for calculating damages
14 and the expert was going to be applying that statutory
15 formula in calculating the bondholder damages, that same
16 methodology could be applied in this case, in the -- in
17 the stockholder case.

18 In fact, there is no statutory damages
19 methodology under the Exchange Act. And, you know, I
20 think this was clear. The fact that the damage -- the
21 expert did not propose a damages methodology that worked
22 or the fact that Chief Judge Marbley didn't do the
23 required analysis or the fact that there is no statutory
24 damages method proposed -- laid out in the -- in the
25 Exchange Act for 10(b) claims --

1 SPECIAL MASTER JUDGE: Let me ask you this: Is
2 there a methodology that's capable of measuring the
3 claim damages here?

4 MR. GIUFFRA: We don't know. It hasn't been
5 proposed. And, in fact, that's the issue that the Sixth
6 Circuit will have to decide. And if the Sixth Circuit
7 agrees with us, that what Plaintiffs have done in this
8 case is not sufficient, the case will be sent back to
9 Chief Judge Marbley. I assume the Plaintiffs will have
10 an opportunity to try to propose a damage methodology
11 that works in the complicated case that we're dealing
12 with about qualitative misstatements over a
13 three-and-a-half-year period involving, you know,
14 different kinds of political activities. Because, as we
15 all know, you know, obviously, someone could be running
16 for office, but when they get in office and if you're
17 paying them bribes, it has a different value in terms of
18 the benefit that you can get. And if someone is trying
19 to get a bill passed -- right -- it's not certain it's
20 going to happen. And if the bill gets passed, then
21 there's repeal attempt.

22 So all those events had different inflationary
23 effects on the stock price. Plaintiffs have not taken
24 any of that into account and have not proposed a damages
25 methodology that works. So --

1 SPECIAL MASTER JUDGE: Can you point me to any
2 Court that's ever applied this kind of inflationary
3 theory?

4 MR. GIUFFRA: Yes. I believe we cite them in
5 our papers. There are multiple cases where Courts have
6 held that classes cannot be certified because the
7 Plaintiff have -- has not been able to put forward a
8 damages methodology that can measure damages on a
9 class-wide basis. So it's something that Courts have
10 done and the Sixth Circuit is going to look at the
11 allegations in this case and make an assessment.

12 So if the Sixth Circuit agrees with us and
13 remands the case back down, there won't be a
14 Section 10(b) case, which is the main case we're dealing
15 with here, where all the discovery is being taken, where
16 we're going to purport -- you know, start planning for
17 expert reports, and there may not be a Section 10(b)
18 case at all here. And so --

19 SPECIAL MASTER JUDGE: Explain to me why
20 subclasses wouldn't work. I mean, if we're going to
21 look at this as a component of damages depending upon
22 the position of Householder at the time and his
23 influence at the time and everything, why isn't that
24 ripe for breaking it down into compartmentalized
25 approach?

1 MR. GIUFFRA: That's something that would have
2 to be assessed following a remand by the Sixth Circuit,
3 by Chief Judge Marbley. The Plaintiff would have to
4 able to come forward with a damages methodology that
5 works for a subclass. The subclass, obviously, would be
6 a much smaller class with smaller damages than in this
7 case. The economic stakes would be lower. So when you
8 look at things like, you know, what are the stakes in
9 the litigation and what discovery should go forward, we
10 look at it differently. We don't know.

11 And, look, we raised these issues on class
12 certification. The Plaintiffs went forward with what
13 was a cookie-cutter, basically, just listing of
14 different methodologies that can be used to assess
15 damages in security cases. They did not do the work
16 that was necessary, did not reflect the issues in this
17 case, the difficulties of this case.

18 This is not a case like, say, Enron or
19 Worldcom, like I said at the beginning, where a company
20 makes a financial misstatement about its earnings and it
21 turns out it's not true. You can see exactly how much
22 the stock price went up when they made the full
23 financial disclosure and how much it went down when it
24 turned out the truth came out. That is not this case.
25 It's a much more nuanced case. And in those types of

1 cases, you've got to do the work and it was not done.

2 Another issue that will happen in this --

3 SPECIAL MASTER JUDGE: Explain to me, though,
4 because, I mean, what's before the Sixth Circuit,
5 they're going to look at whether certification was
6 appropriate and whether it needs to be remand -- you
7 know, decertification on a remand.

8 You know, I assume they would not extend beyond
9 decertification, because it's not really before them,
10 where they would say there is no methodology. They're
11 not going to opine on that ultimate issue.

12 I mean, you're -- this is a convoluted
13 question. So let me try to ask it in two parts, and you
14 can address either one first. The takeaway from -- one
15 of the takeaways from all the briefing is -- I think
16 Mr. Forge would call it hyperbolic. I call it just
17 unfinished or not flushed out enough.

18 You had some conclusory statements of, you
19 know, some of the Defendants are likely to get tossed
20 out of the case. You know, they're -- yeah. I -- I'm
21 not so certain that you've given me the analytic cane
22 for each of those conclusions. So perhaps --

23 MR. GIUFFRA: All right. Let me try to do
24 that.

25 SPECIAL MASTER JUDGE: And here's the other

1 component to that. As part of that same -- let's assume
2 you're absolutely right -- and I'm not expressing an
3 opinion -- we're just assuming for the sake of argument
4 that you're absolutely right, then the remedy in the
5 Sixth Circuit is decertification and remand, I'm
6 assuming. You're not suggesting that they're going to
7 say certification is impossible because there is no
8 methodology. I think that would be going beyond what's
9 in front of them.

10 MR. GIUFFRA: I think that's correct. But I
11 think the -- but the issue would then be, okay, there
12 would be no class. All the discovery that's being
13 taken, you know, first based on our Affiliated Ute
14 theory that we think will be thrown out. All the
15 discovery that's being taken based on the claim that
16 while why they can -- there -- the judge didn't do the
17 proper Comcast analysis.

18 And so, you know, what we're basically saying
19 is you've got to pause the case because the -- whether
20 there is a certifiable Section 10(b) case in this case
21 is now being called into question. And until, you know,
22 the Sixth Circuit rules -- the Sixth Circuit rules
23 however it rules, if they remand and send the case back,
24 there won't be a cert -- a Section 10(b) claim. If we
25 won on both grounds, it will be decertified.

1 And then Plaintiffs will have to try to get a
2 case certified before Chief Judge Marbley. He may or
3 may not agree with them. We would have the ability
4 again to bring another 23(f) case. There have been -- I
5 can give two examples. One of which I was involved in
6 with Mr. Forge's law firm involving Goldman Sachs. We
7 went -- had three 23(f) appeals, including one that went
8 to the US Supreme Court. And the Halliburton case,
9 which also went to the Supreme Court, there were three
10 23(f) appeals.

11 These securities cases are complicated and this
12 is one where -- and in each of those cases, discovery
13 was stayed, pending the 23(f) appeals.

14 So what we're saying here is that, even on a
15 remand, Chief Judge Marbley would have to reassess all
16 the issues related to class certification, which would
17 be -- if they're trying to move on, on the basis of
18 misstatements at that point, there are issues related to
19 whether the statements had any price impact, whether the
20 statements match up, the statements with the corrective
21 disclosure. The only corrective disclosure they point
22 to is the fact that there was disclosure of the
23 Householder indictment. Well, that's different than
24 those statements and whether the statements were or were
25 not accurate.

1 Now, because of the significant impact of a
2 23(f) on a securities case -- and, again, this is only
3 the fourth one that the Sixth Circuit has granted in ten
4 years, and in every one them, District Courts -- the
5 other three, District Courts have stayed discovery,
6 including Magistrate Judge Jolson, in the Big Lots case.
7 And Courts have stayed discovery irrespective of the
8 status of the case. Was it a fact discovery, expert
9 discovery -- they stayed it.

10 Now, Plaintiffs put up a bunch of cases, and I
11 want to just talk about them briefly. They cited six
12 cases where parties moved to stay discovery, but no
13 23(f) petition had been granted. They moved in the
14 District Court to stay discovery.

15 I would -- if we had moved in the District
16 Court before either you or before Chief Judge Marbley,
17 you would have denied it. You would have said we don't
18 know whether the -- we don't know whether you have a
19 strong or weak 23(f) petition. In Chief Judge Marbley's
20 view, it would be, "I think my class certification
21 decision is correct."

22 Of the six cases that they cite, in the one
23 case, which is called Daniels, which is a Second Circuit
24 case, District Court denied the stay before the 23(f)
25 petition was granted. But then when the 23(f) petition

1 was granted, the case was stayed.

2 Plaintiffs cite a case called Petrobras,
3 another Second Circuit case that I'm quite familiar
4 with. The District Court denied the stay, but then the
5 Second Circuit granted the stay following the grant of
6 the 23(f) petition. And then the other two cases that
7 the Plaintiffs cite are not even 23(f) cases, much less
8 securities cases.

9 So the standard for a stay -- there are four
10 factors that need to be considered, and I'll just tick
11 through them quickly. The first one is likelihood of
12 success.

13 Now, that requires a showing only that an
14 appeal raises, quote, "serious questions going to the
15 merits." And we cite that case, Abercrombie. It's a
16 Southern District of Ohio case for that proposition.

17 Well, the Sixth Circuit in this case has
18 already recognized that there are serious questions
19 going to the merits by granting the petition. In fact,
20 in its order, the Sixth Circuit said that, you know, it
21 had considered, quote, "whether the Petitioner is likely
22 to succeed on the appeal," close quote. And, also,
23 quote, "whether the case presents novel or unsettled
24 questions of law," close quote.

25 So that's the one thing we know. We know

1 that's what was considered by the Sixth Circuit in
2 granting the petition. And clearly, that's sufficient
3 to meet the serious questions going to the merits
4 standard. And, again, the questions here are serious
5 questions that could lead to the decertification of the
6 10(b) case entirely. And that -- and so, you know, if
7 Plaintiffs can't satisfy Comcast, there won't be a
8 Section 10(b) class action case. The alleged losses
9 will just be those under the bondholder case, which is
10 truly the tag -- the tail wagging a very big dog.

11 And the Ute -- the Ute ruling will have a
12 significant impact on the scope of the case because
13 Mr. Forge will then have to litigate about each
14 misstatement, the impact of the statement on the price,
15 whether there was loss causation, whether there was
16 scienter with respect to each statement. And that's a
17 different exercise than being able to allege an
18 amorphous nondisclosure of a political corruption
19 scheme. And it's going to be a much harder case to go
20 forward with involving different discovery than what
21 he's dealing with now.

22 In terms of the balance of harms, favoring a
23 stay, clearly because the Sixth Circuit decision may
24 change the contours of this action, continued
25 proceedings based on theories that may well be thrown

1 out would be wasteful, wasteful of judicial resources,
2 wasteful of party resources. There are lots of parties
3 on these Zoom calls. There are many parties who go to
4 the depositions. The parties are spending hundreds of
5 thousands, if not into the many millions of dollars,
6 litigating this case. And as in other cases where 23(f)
7 petitions have been granted, it makes good sense to halt
8 the proceedings until we know what the scope of the case
9 will be.

10 Because, again, class certification is the --
11 probably the most significant aspect of any securities
12 case. If you can certify a class, you can go forward.
13 If you can't, you can't. And the value of the case for
14 all purposes is affected by your ability to certify a
15 class.

16 And, again, in Big Lots, Chief Magistrate
17 Judge Jolson recognized that and recognized, as in this
18 case, that the fact that the 23(f) petition could change
19 the contours of the case warranted a stay.

20 SPECIAL MASTER JUDGE: Let me ask you about --
21 about the harm issue here. You know, the -- the drain
22 on judicial resources is limited in this case,
23 especially since the appointment of special masters --
24 special master.

25 The, you know, impact on the parties fiscally

1 is the most obvious thing. But if some of the theories
2 fall by the wayside, that, certainly, I think, would
3 affect, arguably, the expert reports. I get that.

4 What I have a harder time seeing is how much of
5 the fact discovery that could be completed in the
6 interim. You know, it's -- one of the things here that,
7 you know, jumps out at you is to split the baby and, you
8 know, stay expert discovery, wrap up fact discovery.
9 Because the fact discovery, the facts are what the facts
10 are. There's already the risk in demonstrated actual
11 witnesses saying, "I don't remember." And then if we
12 wait another year, we wait another two years, you know,
13 that may only get worse.

14 So if we permit fact discovery to go forward,
15 but stay the expert component of the case, you know, the
16 theories that are applied to those facts may evolve, may
17 change, my fall away. But the facts are what the facts
18 are. Why should we pause the facts right now when, for
19 the most part, they're going to remain the same and
20 they're going to remain necessary to discovery at some
21 point?

22 MR. GIUFFRA: That's an excellent question.
23 And let me explain why.

24 If the Sixth Circuit rules for us on the
25 Comcast issue, then there will be no Section 10(b) claim

1 in the case. All that will be left will be the
2 Section 11 and the 12 cases. And this, obviously,
3 assumes that they have to go to back in -- they'll go
4 back to Marbley, but -- and then they'll try to certify
5 with a damages expert report.

6 But right now, if the Comcast -- if we win on
7 the Comcast issue, there will not be a certified
8 Section 10(b) case. If there is only a Section 11 and
9 Section 12 case on behalf of the bondholders and that's
10 all the case is about, it's a completely different case.

11 So, for example, scienter, fraudulent intent,
12 will not be an issue in the case any longer. It
13 makes -- you know, all the discovery that's going on now
14 is about witnesses and what they knew and what they
15 didn't know. Discovery about state of mind is
16 irrelevant in a Section 11, Section 12 Securities Act
17 claim.

18 In addition, the class period will be
19 substantially shortened. It's now three-and-a-half
20 years. It will be down to less than a year, if it's
21 just a securities case. Eight of the Defendants in the
22 case, including people who haven't been deposed yet,
23 would be out of the case.

24 Dozens of the challenge statements that they
25 are focused on now, to the extent they were not made in

1 the bond offering or prospectus, will not be relevant in
2 the case any longer.

3 The alleged damages in the case will be limited
4 to the bonds. Nothing else. The market cap loss that
5 they're alleging under -- under the 10(b) case is -- you
6 know, and this is from their complaint Section --
7 paragraph 258 is \$7.6 billion. Under the -- under
8 the -- just the bondholder case, you know, we're
9 probably talking about 200 million. It's a completely
10 different case.

11 And so from a -- purely from the standpoint of
12 fact discovery, fact discovery on the Section 11 and
13 Section 12 cases will be substantially shorter,
14 substantially more limited, won't involve all the
15 discovery about state of mind and fraudulent intent.
16 And you'll need a lot less discovery.

17 So our position -- and then -- and then if we
18 are dealing with -- if it's a Ute case, the Ute part of
19 the case is out and it's actually just a case about
20 misstatements, the case will look completely different.

21 The way Mr. Forge is litigating the case now is
22 to establish that there was a political corruption
23 scheme that was not disclosed and it was known to people
24 inside of FirstEnergy.

25 Well, if that claim is no longer in the case,

1 the discovery will have to focus on each one of the
2 statements. And what statements actually get certified
3 for class, if any, will have to be determined after the
4 remand when it goes down to Chief Judge Marbley. And so
5 we would be able to say, well, what's the damages
6 methodology that your expert is proposing for this
7 statement, that statement, and the next statement?
8 Given that some of the qualitative statement -- they're
9 all pretty much qualitative statements about different
10 events at different times, where the inflation was
11 varying. And they haven't put forward any methodology
12 to deal with that.

13 You're correct that the expert discoveries
14 phase would clearly change, but there's no question that
15 Courts have repeatedly found that conducting wasteful
16 discovery that may not be necessary because a Plaintiff
17 cannot certify a class, because they can't satisfy, for
18 example, Comcast, is something that's -- that meets the
19 balance of harm standard and warrants a stay.

20 The other thing that, you know, Plaintiffs had
21 focused on a little bit is, you know, well, the fact
22 that the appeal may take some time. We're not rushing
23 the appeal. We haven't sought an extension of our time
24 to file the brief. We still don't know when it'll be
25 done, because there are multiple parties that filed

1 23(f) petitions and we made a motion to consolidate all
2 those -- all of those appeals so it would be simplified.

3 But we're -- we -- I can represent to the -- to
4 you and to the Court, we have no intention of delaying,
5 seeking extensions. We're ready to go full speed ahead
6 in the Sixth Circuit.

7 In addition, in every single one of these, you
8 know, 23(f) grants, there's always a risk that witnesses
9 will -- their memories will fade, but Courts still grant
10 the stays.

11 And in terms of the public interest, which is
12 the last factor, the public interest is served by
13 correct application of the law, not having a case where
14 we're going to be spending millions of dollars in
15 discovery when the case may not be one that can be
16 certified as a class because the Plaintiff can't propose
17 a damages methodology that satisfies Comcast.

18 One other point that Plaintiffs raise was,
19 well, we need to have discovery to get the facts out
20 there. Well, the facts about the HB6 scandal are fairly
21 well out in the -- in the public domain. We had
22 Mr. Householder's trial. That was -- that was a public
23 trial. In addition, FirstEnergy, as part of its -- for
24 a prosecution agreement admitted to various facts in
25 its -- in a fact statement. All of that is public.

1 So what we're urging you to sort of sum up
2 would be this is a significant moment in this case.
3 Under Plaintiffs' own recognition, these 23(f) petitions
4 are granted very rarely or rarely. And in the three
5 other times in the Sixth Circuit in the last ten years,
6 District Courts have recognized that you stop the case.
7 You pause the case. And the issues that we're talking
8 about go directly to whether there's a cognizable,
9 certifiable Section 10(b) claim in this case. And until
10 the Sixth Circuit rules and then it goes back to
11 Chief Judge Marbley and we might be back to the Sixth
12 Circuit, it makes little sense to go forward with a
13 litigation on a 10(b) case that may not be one that can
14 be certified as a class. So we strongly urge that a
15 stay be -- that you recommend a stay be issued here.

16 SPECIAL MASTER JUDGE: Thank you, sir.

17 Mr. Forge?

18 MR. FORGE: Thank you, Mr. Judge. I will try
19 to focus on the actual aspects of this case that point
20 towards the unmistakable conclusion that no stay should
21 be granted. But as I have to do every time after
22 FirstEnergy speaks of rights, I have to correct a few
23 misstatements. Starting with one that Mr. Giuffra has
24 repeated multiple times that the three other 23(f)
25 grants all resulted in the District Court staying

1 discovery. That is false.

2 The truth is the three 23(f) grants, over the
3 past ten years in the Sixth Circuit, comprise three
4 cases. In the Big Lots case before Magistrate Judge
5 Jolson, fact discovery had been completed. So there was
6 no stay of fact discovery.

7 Judge Jolson denied the request to stay written
8 expert discovery which consists of expert reports. So
9 Judge Jolson ordered the expert reports to proceed.

10 The only thing Judge Jolson stayed was other
11 expert discovery, which, as we all know, would consist
12 only of the expert decisions. So all the fact discovery
13 was complete and Judge Jolson ordered the expert reports
14 to be completed.

15 In the BancorpSouth case, that's even worse.
16 The discovery was not stayed when a 23(f) petition had
17 been granted. When the case returned to the District
18 Court after the 23(f) had been resolved, on remand, the
19 Magistrate Judge stayed discovery only while the
20 District Court revisited the class certification motion
21 and expressly denied the request to stay discovery
22 pending an appeal in the event that the District Court
23 granted class certification. So the Magistrate Judge
24 refused to prospectively stay discovery pending appeal.

25 In the third of the three cases, the Tivity

1 Health case, both fact and expert discovery was
2 complete, and so there really was no choice but for the
3 Court to stay proceedings. Because once there is a
4 certified class, in order for the trial to be binding on
5 everyone, there has to be class notice sent and an
6 opportunity to opt out. So all of discovery had been
7 completed.

8 So literally not a single one of the cases does
9 what Mr. Giuffra wants you to do, even though he said
10 all of them did what he wants you to do.

11 Now, I want to move on to another misstatement
12 in FirstEnergy's reply brief and it was also woven
13 throughout Mr. Giuffra's lengthy statement, which
14 essentially read their brief.

15 At page 12 of their reply --

16 SPECIAL MASTER JUDGE: Hold on one second,
17 please.

18 MR. FORGE: Okay.

19 SPECIAL MASTER JUDGE: As you guys can imagine,
20 I have quite a few documents open here.

21 MR. FORGE: Well, I will say there's one
22 advantage of the Zoom format, that we can have a lot
23 more landscape in front of us.

24 SPECIAL MASTER JUDGE: Okay. Please go ahead.

25 MR. FORGE: Okay. At page 12, about one-third

1 of the way down the page, they write, "In their
2 omissions case, Plaintiffs must conduct fact discovery
3 focused (as they have done to date) on establishing an
4 amorphous undisclosed corruption scheme that was
5 material and caused investor loss."

6 Now, in reality, I know Mr. Giuffra has -- I
7 don't think he said a word on the record actually in the
8 discovery in this case. So I don't know if he's
9 actually watched any of the depositions, but for those
10 of us who have actually participated in the depositions
11 and actually taken the depositions, we know that is a
12 completely erroneous characterization.

13 If you turn to the complaint itself and
14 specifically at page 29, paragraphs 93 and 94, you can
15 see just how deceptive that description is. At page 29,
16 beginning with the heading "The Numerous Methods and
17 Means of Defendants' Bailout Scheme," we have, at
18 paragraph 93 and subparagraphs A through I, all
19 different methods and means of the bailout scheme that
20 don't involve statements at all.

21 So we have numerous methods and means. And
22 this is all -- for those of us who have prosecuted fraud
23 cases, both civilly and criminally, for our entire
24 careers, there's nothing unusual about this. This is
25 not amorphous, and it's, obviously, disclosed. This is

1 the way schemes are alleged. You've alleged methods and
2 means of the scheme, you describe those methods and
3 means, and then, at least in the civil case, you take
4 discovery to prove or, in the Defendants' case, disprove
5 those allegations.

6 So we have nine specifically delineated methods
7 and means that don't involve statements. Then when you
8 turn to paragraph 94, you see in the complaint it says,
9 "In addition to these methods and means, Defendants also
10 executed a bail -- the bailout scheme through a series
11 of materially false and misleading statements, including
12 statements about the following topics."

13 And what's important there, Mr. Judge, is the
14 combination of materially false and misleading public
15 statements. What you will see throughout this entire
16 complaint is that we have never -- the complaint never
17 says this statement is false. This statement is an
18 omission. It's always all of these statements are
19 alleged to be false and misleading.

20 There's not a single statement, not one, not a
21 single statement that is alleged in this complaint that
22 will be impacted at all by this appeal. Not even
23 potentially, not a single one.

24 So you can see examples -- if you turn to
25 page 6 of the complaint, in paragraph 15, it's just a

1 venue allegation, but we're talking about omissions and
2 false and misleading statements in the same paragraph.

3 If you turn to page 31, the heading that really
4 begins the description of all the statements,
5 "Defendants' Materially False and Misleading Statements
6 and Omissions During the Class Period," this is a theme
7 that carries on throughout the entire complaint. You
8 can turn to any reference to omission or omit and you'll
9 see misstatement also being alleged, or untrue
10 statement.

11 The very next page, page 32, Footnote 12,
12 quoting the Sarbanes-Oxley certification, the
13 certification is that the annual report did not contain
14 any untrue statement of material fact or omit to state a
15 material fact necessary to make the statements made in
16 the light of the circumstances on which they are --
17 under which they are made not misleading. This is
18 throughout the entire complaint.

19 So this is a completely false representation
20 that the substance of the case will be impacted at all,
21 at all, by this appeal.

22 SPECIAL MASTER JUDGE: I mean, I think the
23 logical extent in what you're saying to connect the dots
24 is, this is why Chief Judge Marbley said you're either
25 going to have the Affiliated Ute presumption or you're

1 going to have the Basic presumption.

2 MR. FORGE: Exactly. And along those lines,
3 Mr. Judge, I'll tell you, there's only one paragraph in
4 the entire complaint that will be impacted potentially
5 by this appeal. That's paragraph 256 at page 95.
6 That's the only one. And because that's the paragraph
7 that alleges the Affiliated Ute presumption. And what
8 Chief Judge Marbley said, in addition to you're either
9 going to have one or the other, was that the damages
10 issue is not going to derail class certification in this
11 case, period. He's going to certify -- if he has to
12 certify just for liability, that's going to happen.

13 But we're not even close to that point. We're
14 not even close to Judge Marbley having to consider that
15 kind of a scenario, and I submit we're never going to
16 reach that point, because, number one, there's never
17 been a case like this. And they have failed to cite a
18 single one where a class is not certified because the
19 inflation, in the Defendants' view, varies over time.
20 Never happened before.

21 SPECIAL MASTER JUDGE: Well, I think I tried to
22 ask that of Mr. Giuffra during his argument in a poorly
23 worded question. And he said -- he cited me to a number
24 of cases, the Daniels case, I believe, where he said,
25 you know, yes, they've applied the theory, that the

1 theory existed.

2 I take from what you're telling me and from
3 your briefing, it's never been applied.

4 MR. FORGE: It's never been applied to reject a
5 certified class for damages --

6 SPECIAL MASTER JUDGE: On the front end --

7 MR. FORGE: -- because -- because of a claim --
8 because of a claim that the damages varied over time.

9 SPECIAL MASTER JUDGE: Yes.

10 MR. FORGE: And which is their claim.

11 And let me just give you a quick example to
12 show just how easily this could be done without getting
13 into the nuts and bolts of the methodology.

14 As Mr. Giuffra mentioned, at the time of the
15 disclosures in this case, there was a market cap drop of
16 approximately \$8 billion. What was exposed at that time
17 was that FirstEnergy had effectively become a criminal
18 enterprise. The market cap dropped \$8 billion.

19 That fact that FirstEnergy had become a
20 criminal enterprise was true the first day they started
21 their criminal activities all the way through to the
22 last day.

23 Even if you say a portion of that drop was
24 probably the market figuring that, down the road, these
25 benefits from HB6 were going to be lost and that is what

1 varied over time, because the likelihood of getting
2 those benefits varied over time. Before Mr. Householder
3 was the speaker of the house, it was here. Once he was
4 speaker of the house, it was here. Once they passed
5 HB6, it was here. And then once they criminally
6 defeated the referendum, it was up here. So it varies
7 over time. Fine.

8 The problem with that argument in trying to
9 throw the baby out with the bath water here is that's
10 just a small component of the damages, because the
11 present value of those benefits, as of July 21st, 2020,
12 was not over a billion dollars.

13 So even if -- even if we ultimately said, you
14 know what, we're not even going to mess with the
15 variable portion of the damages, we're just going to go
16 with the portion that we can see the market took out of
17 this stock price, when it found out that this company
18 had been a criminal enterprise for, you know, the past
19 three years, fine. We're still talking about \$7 billion
20 of damages that don't vary over time.

21 Now, they can make whatever arguments they
22 want, that, oh, it wasn't -- it was a really bad
23 criminal enterprise in 2019, but it was less of a bad
24 criminal enterprise in 2017. That's all argument.
25 That's not a Comcast argument. That's just argument.

1 We have cases where every day Plaintiffs pursue
2 and obtain damages for pain and suffering. If pain and
3 suffering can be handled -- if a jury can figure out
4 what a dollar value is for pain and suffering, they can
5 easily, especially with the assistance of an expert, do
6 the math in figuring out how the market valued this
7 corruption scheme. Because we know how much value the
8 market took out of FirstEnergy's share price when it was
9 finally exposed.

10 So what we come back to, once we recognize
11 that, number one, this case is never going away -- and
12 when I say "this case," I mean the entire case. There
13 will be a 10b-5 case, no matter what. There's no
14 circumstance under which there will not be a 10b-5 case
15 going forward.

16 There is also no circumstance in which the full
17 scope of this 10b-5 case will not go forward. And
18 that's why it's -- it really is an unusual application
19 of the four factors here, because FirstEnergy has
20 absolutely no chance of success if we're measuring the
21 likelihood of success being wiping out or even changing
22 the 10b-5 aspect of this case. They have no chance
23 whatsoever.

24 Number one, the Class Plaintiffs themselves are
25 not going away. Number two, we have an opt-out or

1 direct-action case that is a class action itself.
2 They're not going away. Number three, we have the
3 presiding judge in this case of saying not only are --
4 okay. That's fine. Not only going forward
5 individually, if I didn't certify the class, but I'm
6 going to certify the class, irrespective of damages.
7 That is happening.

8 So no matter what, the 10b-5 case is going to
9 proceed and it's going to proceed exactly the way it's
10 alleged and exactly the way it has been investigated
11 throughout discovery. That's not going to change. So
12 there's absolutely no chance of saving any money, which
13 the Courts have fairly consistently said is not a form
14 of irreparable harm. And more importantly, this is why
15 FirstEnergy never asked to stay discovery before,
16 because they know it's inevitable.

17 You see in the BancorpSouth case, which they
18 cite for the, you know, false assertion that the
19 District Court stayed discovery pending a 23(f) appeal,
20 but in that BancorpSouth case, Mr. Judge, the Defendants
21 moved to bifurcate fact and class discovery in its case
22 management order. The Court did not bifurcate. Then
23 they moved to bifurcate fact and class discovery. The
24 Court denied that request. They were consistent in that
25 case of essentially taking the position that the whole

1 case might get knocked out on this class certification
2 issue, so we shouldn't move forward with fact discovery.
3 They lost, but at least they were consistent.

4 Here we have FirstEnergy never even raises the
5 possibility of bifurcating discovery. Not in a case
6 management order, not in a motion to bifurcate
7 discovery, not when they oppose class certification, not
8 when they are waiting for Judge Marbley to issue his
9 class certification decision, not after Judge Marbley
10 issues his class certification, not even when they filed
11 the 23(f) petition did they include or request that the
12 Sixth Circuit stay discovery.

13 That all speaks to the fact that there can't be
14 irreparable harm here, because if there is, then they
15 committed malpractice by not asking to avoid that
16 irreparable harm at any time prior to now.

17 So it's really just an opportunistic argument.
18 It's not a substantive argument. It's not backed up by
19 the realities of the allegations in this case. It's not
20 supported by the way the fact discovery has been pursued
21 in this case. It's just an opportunistic
22 sound-bite-based argument.

23 And to drive home that point, I want to point
24 out that, in the rule itself, in 23(f) itself, it
25 expressly states that granting of a petition does not

1 mean staying the proceedings.

2 Now, every one of Mr. Giuffra's arguments, when
3 they're actually corrected, every one of his arguments
4 essentially would support staying every case when a
5 23(f) petition is granted. Yet that is exactly the
6 opposite of what the rule says. The rule says it's
7 not -- every case is not stayed.

8 I want to -- you know, the very first appellate
9 argument I had as a prosecutor -- the panel asked me a
10 question that I always think about every time when I
11 have an oral argument and -- because it's such a great
12 question, is which one case do you think best supports
13 your position? Which one case?

14 For us, in this case, I think it's the Beattie
15 case. That is 2006 Westlaw 172207. I think that case
16 best supports our position here for several reasons.
17 First of all, it specifically reminds the parties that
18 Rule 23(f) specifically notes that an appeal does not
19 stay proceedings in a District Court unless the District
20 Judge or the Court of Appeals so orders.

21 Second, when it talks about whether a
22 substantial question is presented, it talks about
23 whether the -- there's a question presented that could
24 end the case. It's not a substantial question if
25 FirstEnergy has a reasonable likelihood of prevailing on

1 what is effectively a technicality.

2 This Affiliated Ute issue -- and Mr. Giuffra is
3 dead wrong when he says that there's six courts or seven
4 courts or any number of courts that have ever held that
5 a mixed case is, per se, not allowed to proceed as an
6 Affiliated Ute case. When I say "a mixed case," I mean
7 a case that alleges both false statements and omissions.
8 What all of the cases say is what is important is
9 whether the case, in essence, is primarily a false
10 statements case or primarily an omissions case.

11 But either way, they've already conceded that
12 the basic presumption of alliance applies here. So
13 there's no chance that the case is going to go away.
14 And so there isn't a substantial question presented here
15 in the sense of a question that is actually going to
16 impact the discovery we're talking about resuming here,
17 which is what we need to do.

18 And the second fact of the Beattie case talks
19 about costs not being irreparable harm, and there the
20 only cost that the Court was willing to preserve would
21 be the cost of sending out class notice. And,
22 obviously, we're not going to do that until class
23 certification is finally adjudicated here.

24 The third, the Court talks about the prejudice
25 to the other side by, you know, delaying resolution. So

1 that's prejudice to us here, you know, Plaintiffs by
2 delaying resolution. As you accurately pointed out,
3 we've already had instances of memories fading. We've
4 actually had an instance of a witness dying. But, look,
5 do memories fade if you delay proceedings? Of course.
6 Does that mean you cannot, as a rule, stay proceedings?
7 No, it doesn't.

8 I'm not -- I'm not here to tell you, Mr. Judge,
9 or Chief Judge Marbley, that, you know, you -- it is,
10 per se, improper to stay discovery when a 23(f) petition
11 is filed. But I am here to say that, under these
12 circumstances, we're -- we're already several years down
13 the road from when the case was filed. We're already,
14 you know, well down the road in completing fact
15 discovery. To lose all of that momentum and to wait
16 what is probably going to be a year to resume fact
17 discovery -- that would unquestionably prejudice us.

18 Does that alone mean it should not be stayed?
19 That alone? Probably not. But it is yet another factor
20 that supports denying the request for the stay.

21 SPECIAL MASTER JUDGE: That leads into the
22 question I asked Mr. Giuffra about letting fact
23 discovery go forward but staying any expert discovery
24 and expert reports and such. I'm assuming you're going
25 to tell me that's a bad idea.

1 MR. FORGE: Well, here's -- here's -- yes, your
2 assumption is correct, but here's why. And this is not
3 an instance where, as you, I think, elicited through
4 your questions -- this is not an instance where our
5 expert says damages can be calculated using this
6 methodology and their expert says damages cannot be
7 calculated. And we want the Sixth Circuit to say
8 damages cannot be calculated. That's not the case here.

9 The case here is our expert says damages can be
10 calculated using this methodology. And they say that's
11 not a -- that's not enough of a description for us to
12 really test it one way or the other.

13 Maybe they can be calculated. Maybe they can't
14 be, but we don't know enough from this description.
15 Because that is the argument they're making in the Sixth
16 Circuit, and Mr. Giuffra conceded this.

17 At most, the case is going to come back down
18 for them to get more information about our damages
19 methodology. That is the absolute best-case scenario
20 for them on the contest issue. Most -- most that can
21 possibly happen is we have to provide them with more
22 information. Well, that's exactly what's going to
23 happen if we proceed with the expert discovery.

24 So -- so that's right. It's not just because I
25 want to get through the expert discovery. It's because

1 we're actually going to provide the very information
2 they purport to want if we go forward. So there --
3 there is -- and, you know, the other -- the last thing I
4 want to come back to with the Beattie case is,
5 throughout all of Court's analysis, it emphasizes the
6 fact that the case is going to go forward. The case
7 will still proceed. And that really distinguishes this
8 case from any other in which, you know, there's been a
9 stay of proceedings.

10 This case is not going away. The Plaintiffs
11 have made it clear in the class case. The Plaintiffs
12 have made that clear in the opt-out or direct-action
13 case, and Judge Marbley has made it clear in his own
14 statements.

15 And the last component of Beattie which is
16 relevant here is the public interest. And what the
17 Court said there was the Plaintiffs likely have an equal
18 argument that the public interest favors allowing the
19 case to proceed. The Plaintiffs seek to hold a company
20 accountable for deceptive billing practices.

21 If deceptive billing practices was enough to,
22 you know, get a public interest factor for the
23 Plaintiffs there, clearly in this case, we have a strong
24 public interest in the case moving forward.

25 You can -- it doesn't take more than 30 seconds

1 to find an article online in which some reporter is
2 asking why don't we -- you know, why haven't we gotten
3 the full picture of this case? Why don't we know who on
4 the FirstEnergy side is responsible?

5 We just had Sam Randazzo indicted last month.
6 So the case is far from over just on the criminal side
7 of things. So the public has an extreme interest in
8 this case moving forward and us completing discovery so
9 we can present the public with that complete picture.

10 And with that, I would -- I would love to
11 answer any questions you might have.

12 SPECIAL MASTER JUDGE: I think I'm good for
13 now. I may circle back to something. I want to see
14 what Mr. Giuffra says about it on his rebuttal.

15 MR. FORGE: All right.

16 SPECIAL MASTER JUDGE: But, no, I appreciate
17 the argument. Thank you.

18 MR. FORGE: Thank you.

19 MR. GIUFFRA: Okay. Why don't I start off with
20 the -- with the same point, which is that whether the
21 Section 10(b) claim goes forward or not is not dependent
22 on whether Plaintiffs want it to go forward or whether
23 Chief Judge Marbley wants it to go forward. It's going
24 to depend on what the Sixth Circuit says about whether
25 that claim can go forward. And what Plaintiff did not

1 dispute was that if they can't come up with a damages
2 methodology that satisfies Comcast, then presumably the
3 Sixth Circuit will say what's required to be a damages
4 methodology that satisfies Comcast. The Section 10(b)
5 case, which is their principal claim, does not go
6 forward.

7 SPECIAL MASTER JUDGE: Let me stop you right
8 there. If the Sixth Circuit lays out what would satisfy
9 Comcast, you know, the likely avenue is not they're
10 going to say somebody can get it right in the future.
11 They're going to remand it here so these guys can get it
12 right now.

13 So you're not telling me they're going to -- I
14 mean, on one hand, I think you're telling me they're
15 going to foreclose the claim, 10(b) claims, and they're
16 out. I can't -- explain to me how that's going to
17 happen, because what I see at worst-case scenario for
18 the Plaintiffs -- and do not hesitate to tell me where
19 I'm thinking of this incorrectly -- but worst-case
20 scenario for the Plaintiff is, you know, the Sixth
21 Circuit provides guidance, even in dicta, on what a
22 Comcast methodology would work here, remands it, and
23 then we have guidance for the expert.

24 MR. GIUFFRA: That's absolutely correct. I
25 agree with you 100 percent. That's -- that's what would

1 happen in the Sixth Circuit. The Sixth Circuit would
2 say -- it would look at the allegations in this
3 complaint, it would look at the damages methodology that
4 was proposed, which was a, you know, literally
5 off-the-rack just listing possible damages methodology,
6 say it's not acceptable, say what you would need to do
7 in this case. Perhaps. It might not do that much.
8 They might say, look, just what they did was not enough,
9 but they could give some -- they could give some
10 guidance.

11 It would go back to Chief Judge Marbley. The
12 Plaintiffs would have to make another class
13 certification motion on the Section 10(b) claim. They'd
14 have to come up with a new expert report. We might have
15 to take discovery with respect to that expert report,
16 and then Chief Judge Marbley would have the ability to
17 certify a class. If he certified a class based upon the
18 damages methodology that was proposed, we would have the
19 ability to file another 23(f) petition, and the case
20 could go back up to the Sixth Circuit.

21 And as I indicated before, there's a case that
22 I was involved in with Mr. Forge's firm that that
23 happened three times in the Second Circuit, the Goldman
24 Sachs case. In the Halliburton case, it happened three
25 times.

1 But that is the way it would go. I'm not
2 saying that the Sixth Circuit will preclude Plaintiffs
3 from having the ability to certify a Section 10(b)
4 claim. What the Sixth Circuit could do, though, is say
5 what you've done so far is not enough, and decertify the
6 Section 10(b) claim. And what Mr. Forge is saying is,
7 well, let's go forward with discovery like nothing
8 happened, like the 23(f) petition didn't happen.

9 And, remember, the Sixth Circuit had a choice.
10 It could have just taken the Ute issue, or it could have
11 taken the Comcast issue. It took both issues and said
12 that it assessed -- likelihood of success in granting
13 the petition.

14 You know, one thing that was said before, which
15 it's just -- and I don't like to say that opposing
16 counsel, you know, is wrong, but with respect to
17 Affiliated Ute, there are literally seven Courts of
18 Appeals that have held you can't have an Affiliated Ute
19 claim based on an undisclosed scheme.

20 One of those cases, I argued in the Sixth and
21 the Seventh -- in the Ninth Circuit, excuse me -- which
22 was the Volkswagen case. And, you know, while this is,
23 obviously, a big fraud, you know, case and, obviously,
24 there's wrongdoing that was done by people like
25 Householder, et cetera, the Volkswagen emissions case

1 was clearly a global fraud case. And in that case, what
2 had happened was the company in its -- in its
3 disclosures had not disclosed it was cheating on
4 emissions with respect to cars for, you know, 10 million
5 cars around the world.

6 The District Court judge, Judge Breyer,
7 actually adopted the same reasoning that Chief Judge
8 Marbly did in this case, but then he certified the
9 issue under 1292 and it went to the Ninth Circuit, and
10 the Ninth Circuit said that, when you have a case which
11 is primarily a misstatement case -- and in that case,
12 there were 50 misstatements. Here we have 42 -- the
13 fact that the claim is that there was a half truth --
14 i.e., that the statement did not fully disclose all of
15 the facts -- still meant that you could not rely upon
16 Affiliated Ute. And there were other cases like that.
17 I'm quite confident that the portion of this decision
18 dealing with Affiliated Ute is wrong, at least under the
19 law of seven circuits, and it will change what this case
20 looks like going forward.

21 But on the Comcast issue, there's no question
22 that we're dealing with a situation where -- and there
23 are other cases that I can talk to about the question of
24 whether have there ever been a case involving varying
25 inflation? Well, the Comcast case itself was a case

1 where the Supreme Court held that the damages theory did
2 not match the liability theory, including because of the
3 fact that there were issues with respect to how you --
4 how you calculate the damages.

5 A case that, I think, is a very important one,
6 where we actually prevailed and our firm handled it, was
7 the BP Securities litigation, which is 2013 Westlaw
8 638840, and this is at *17, Southern District of Texas,
9 December 6th, 2013. And the Plaintiffs in that case --
10 and it didn't go to the -- it did not go to the Fifth
11 Circuit, because this was at the District Court level --
12 the Court held that the damages methodology was
13 insufficient, and that was a case where there were
14 disclosures made by BP at various moments in time about
15 safety with respect to oil rig situations.

16 And it was, obviously, different points in time
17 when the disclosures were made and it was a case where,
18 you know, you had sort of -- you have disclosures that
19 were made before the spill and disclosures that were
20 made after the spill. And the Plaintiffs -- the -- the
21 Court held that you couldn't rely upon what's called the
22 constant-dollar-damages methodology, which is what
23 Plaintiffs are doing here, where they're essentially
24 just looking at what was the stock price of the bidding
25 in of the class period, what was the stock price at the

1 end of the class period, and saying, voilà, that's the
2 damages. And since you have to take into account the
3 varying inflation that occurs at moments in time and the
4 constant-dollar approach, which was one of the
5 methodologies that was adverted to in the, shall I say,
6 like, two-page damage report that was put forward by
7 Plaintiffs' expert did not, you know, rely -- it
8 referenced that as being a potential method, but that
9 method doesn't work when you have a case where you have
10 different representations that are made over -- at
11 different moments in time and you can't have constant
12 inflation in a case like -- like this one, where, you
13 know, it deals with, you know, alleged political acts
14 that were all very contingent.

15 In the -- in the Beattie case, which was
16 referenced, the Defendant failed to identify every --
17 any portion where there isn't challenging issues with
18 respect to class, and that's at 2006 Westlaw 172207 at
19 *4 (sic) and *9 -- let me read that back, because I was
20 reading quickly. 2006 Westlaw 172207 at *7, *9.

21 And then a point that was raised, you know, I
22 think which -- I think is an important one, is that, you
23 know, what are the cases where Courts have held that
24 classes can't be certified because of damages
25 methodology hasn't been put forward but satisfies

1 Comcast. One is the BP case, which I dare say is a
2 major, you know, issue in the world. I mean, a big -- a
3 big securities case. And the second one is a case
4 called Nyp1 versus JPMorgan. That's 2022 Westlaw 819771
5 at *7. That's Southern District of New York, March 18,
6 2022, and the Court dismissed in that case because a
7 reliable damages methodology had not been proposed.

8 Now, in the -- let me go back to the Beattie
9 case. In that case, that was a situation where, in
10 filing the appeal for the 23(f) -- that was one of these
11 cases where someone, I believe, filed -- you know, this
12 was -- this was before the 23(f) had been granted, and
13 the District Court said that it's seeking a stay. The
14 Defendant had, quote, asserted that substantial
15 questions are present because Courts of Appeals were,
16 you know, and that -- and that they hadn't identified in
17 the -- in moving for the stay, there wasn't -- there was
18 a grant in that case, but the -- the problem was that
19 the Plaintiff, unlike what we're doing, hadn't
20 identified, well, what were the bases and how would the
21 23(f) petition, which was granted in the Beattie case,
22 how would that affect the case going forward.

23 So I think of one of the things we certainly
24 have done in this, you know, in this argument and in our
25 papers is explain why we think the 23(f) could be

1 significant here, and clearly, since the Comcast issue
2 is before the Sixth Circuit and could result in the
3 decertification of the 10(b) claim, that's a real issue.

4 Now, on the issue of fact versus expert
5 discovery, I think it would be a huge, huge, huge
6 mistake to allow expert discovery to go forward in this
7 case before we let the Sixth Circuit actually say
8 whether -- that what sort of a damages methodology is
9 necessary in this case. Makes no sense. Why wouldn't
10 we wait for the Sixth Circuit to address that issue?
11 Again, the Sixth Circuit took review on both issues.
12 And, again, the Beattie case, the Plaintiff is not
13 pointing out -- did not point out to the District
14 Court -- the Defendants did not point out to the
15 District Court why the 23(f) petition could
16 significantly impact this -- the case, and I think
17 Mr. Forge would have to concede that if -- if the
18 Plaintiffs are unable to propose a damages methodology,
19 and we might have to go back to Chief Judge Marbley and
20 then back up to the Sixth Circuit, that could lead to
21 the decertification of the Section 10(b) claim.

22 They may say, well, that's a wishful thinking
23 by us, but it's still a real -- it's still a possibility
24 and a reason why a stay should be necessary -- should
25 be -- should be granted here.

1 Now, the beginning of Mr. Forge's argument, he
2 talked about, oh, we're misstating what the cases are.
3 Let me go through the law on this. In the Big Lots
4 case, which is Magistrate Judge Jolson's case, the stay
5 was granted, expert discovery as soon as the 23(f)
6 petition was granted, and she wrote an opinion that you
7 have. You -- that's cited by both sides. In that case,
8 the Defendants did not object to doing the expert
9 reports and filing -- and filing them. I think they may
10 have already been done at that point, and so that's a
11 different fact pattern than this case.

12 In the other two cases, which is BancorpSouth
13 and a case called Tivity -- in that case, unlike this
14 one, the 23(f) petition was granted, and then the case
15 was remanded in the same order. So that the class
16 certification error must have been so egregious that the
17 Sixth Circuit said, well, we're remanding -- we're just
18 sending it right back and -- and even at that point,
19 okay, the District Court still granted a stay of
20 proceeding.

21 Now, the case was back in the District Court,
22 but -- but in that case, the District Court granted --
23 and this is BancorpSouth -- granted a stay of discovery
24 pending the District Court's decision on class cert
25 following remand.

1 Okay. So that would be us going to Chief Judge
2 Marbley following a remand and asking for a stay. And
3 in Tivity, the Court granted the stay, pending the
4 outcome of the petition, and that was another case where
5 there was a petition and it got remanded and then there
6 was a stay.

7 There are cases which we cited, and let me give
8 you those. Lannett, L-a-n-n-e-t-t, which is -- this is
9 a case we cited in our -- in our brief, and then the
10 other case would be IBEW Local 98. These are cases that
11 are cited at page 4, Footnote 1, of our reply brief,
12 along with others, where cases were stayed, in fact,
13 discovery. The status of where the case is, is really
14 not the question. The question is, is the case one --
15 and I think Mr. Forge is correct. Let's talk about the
16 Beattie case.

17 Has the Defendant articulated reasons why the
18 decision of the Sixth Circuit -- could the decision of
19 the Sixth Circuit result in the decertification of the
20 class here? The answer to that question is clearly
21 true. In addition -- it's clearly true. And in
22 addition, you know, that could have significant impacts
23 on discovery, including who the parties are in the case
24 and the like. I like Mr. Forge's example, what's your
25 best case. Here's one for us. This is the Lannett

1 case, which I mentioned.

2 And that's a case where the Third Circuit
3 after -- after a -- and I think this is where we can end
4 up here potentially -- the Third Circuit stayed
5 discovery pending a 23(f) appeal in a securities case in
6 the middle of fact discovery after the District Court
7 denied the stay, recognizing that, you know, in -- in
8 these types of cases, where a 23(f) petition is
9 addressing issues that go to the, you know, the central
10 issues in the case, it makes sense to stay discovery.
11 So we urge you to do that, but clearly to allow expert
12 discovery to go forward here, when the very issue that's
13 before the Sixth Circuit will impact the scope of expert
14 discovery, what the experts might be doing and we might
15 be back and forth to the Sixth Circuit several times on
16 the expert reports and what's satisfactory and what's
17 not, those wouldn't make any sense.

18 I recognize that, obviously, you know,
19 Mr. Forge is for Plaintiffs. Plaintiffs want to keep
20 push, push, push, push, push, but you still got to deal
21 with the fact that a 23(f) grant in a securities case is
22 a major event. And he hasn't cited any cases where, you
23 know, Courts at least in -- in this district have just
24 said, you know, go full-blown with fact discovery. It
25 just so happens that this is the one where there's a

1 grant where we're in the middle of fact discovery.

2 So we urge -- we urge the Court to stay
3 discovery where the case stands. We will represent that
4 we will move as expeditiously as possible to brief this
5 Sixth Circuit appeal, and we -- we want to get the case
6 wrapped up just as much as Mr. Forge does.

7 SPECIAL MASTER JUDGE: Thank you.

8 Mr. Forge, I hesitate to ask, but any -- any
9 brief rebuttal?

10 MR. FORGE: The only thing I would point out is
11 a couple -- couple of additional mistakes. The VW case,
12 Mr. Giuffra started out with a, you know, a lot of
13 bluster about how that -- that's the case that proves
14 that these mixed misrepresentation cases and omission
15 cases categorically cannot be done under Affiliated Ute,
16 and then he slipped up and acknowledged that what the
17 Court's analysis turned on was whether it's primarily an
18 omissions case or primarily a misrepresentations case,
19 which is exactly what I said. I would point out that
20 the VW case, I believe, there were nine pages of alleged
21 misrepresentations in the complaint, and that is what
22 convinced the Ninth Circuit that that was primarily
23 and -- misrepresentation, a misrepresentations case, not
24 an omissions case.

25 More importantly, the case went forward and

1 resulted in a multibillion dollar resolution. So, you
2 know, more power to Mr. Giuffra if he wants to, you
3 know, land this flight similarly to the VW case. The
4 Beattie case -- initially, he said that the 23(f) was
5 denied, but, again, thankfully, he corrected himself and
6 acknowledged that the Beattie case, the Court denied the
7 stay after the 23(f) was granted. And everything else,
8 I think, is just him repeating earlier arguments that
9 I've already responded to.

10 MR. GIUFFRA: Mr. Judge, can I just make one
11 point, because I think it's important. In the VW case,
12 it was the bondholder case, and in that case, the class
13 was decertified, pending motion for summary judgment to
14 dismiss the claim of the named Plaintiff. So I think
15 this is the securities case, not the -- not the consumer
16 class action. And so the winning on the Affiliated Ute
17 effectively ended that case, because the only ground
18 that the Plaintiff had tried to get class certified was
19 Affiliated Ute. The Basic issue, they couldn't do
20 because of the bondholder case, and there wasn't an
21 efficient market for the bonds.

22 In addition, like in VW, like in this case,
23 this is a case where there's 42 misstatements. When he
24 started his argument, Mr. -- Mr. Forge talked about all
25 the misstatements in the case, and so when cases were --

1 Plaintiffs are relying on, you know, 40 or more
2 misstatements, you can't also bring a Ute case.

3 SPECIAL MASTER JUDGE: Thank you. Thank you
4 both for your arguments. They were very helpful. The
5 motion's taken under advisement. My report and
6 recommendation will issue shortly, briefly, hopefully,
7 soon.

8 Mr. Giuffra, do you want a -- do you need or
9 want a break of any length before we jump into the
10 opt-out case arguments?

11 MR. GIUFFRA: I'm happy to -- I'm happy to deal
12 with it right now so we can get this all -- I mean, if
13 you want to have a break -- if you'd like to have a
14 break for a few minutes, that would probably be fine
15 with me.

16 SPECIAL MASTER JUDGE: I'm fine. I have those
17 documents teed up as well. I'm ready to jump into that.
18 I think this will be very short, but I -- you know, I
19 know we've been going for an hour and 24 minutes, and I
20 don't know if you need a break or not.

21 MR. GIUFFRA: I can just keep going. It won't
22 be -- it's not going to be a very long argument.

23 SPECIAL MASTER JUDGE: Please proceed.

24 MR. GIUFFRA: I think, you know, we also think
25 the opt-out cases should be stayed. You know, the

1 opt-outs have, obviously, throughout this whole process
2 sought the same discovery as the class action. They're
3 participating in the same depositions, they're sharing
4 discovery back and forth. Chief Judge Marbley made the
5 sensible decision to set a schedule that had the class
6 action going first and then the opt-outs going second.

7 The issues on the appeal will expect the
8 opt-outs both alleged Affiliated Ute in terms of
9 alleging reliance, and so that issue will be important
10 in both cases, the citation for that. In the MFS
11 complaint, it would be paragraphs 178 to 182; in
12 Brighthouse, it's 166, 270.

13 In addition, the MFS and the Brighthouse
14 Plaintiffs assert losses, the same losses as in the
15 class case, and -- and so how the Sixth Circuit rules on
16 what damages methodology is used to actually figure out
17 damages will impact their cases as well, including on
18 issues like loss causation.

19 So, you know, these cases have been tied
20 together. It doesn't make any sense to separate them.
21 The issues are largely the same, and so, I think, the
22 same analysis applies to both.

23 SPECIAL MASTER JUDGE: Thank you.

24 Mr. Heimann, I know you've been waiting
25 patiently. Your ball.

1 MR. HEIMANN: Oh, I hate to spill more
2 metaphysical ink in these arguments, but the key point,
3 I think, in response is we did not argue, as the
4 Defendant apparently construed our brief, that we should
5 not be stayed despite a stay in the class case. While
6 I'm perfectly prepared or would be perfectly prepared to
7 proceed forward with discovery, as I think we ought to,
8 I don't think it's an efficient use of judicial
9 resources, in the event that the class case were to be
10 stayed, to allow our case to proceed. And so I would
11 concede if, in effect, that if the class case is stayed
12 for purposes of discovery, that our case should be
13 stayed as well.

14 But I want to emphasize that I disagree
15 completely with the notion that in the event Affiliated
16 Ute were to be removed from the case, that would have
17 any material impact on the discovery that would be taken
18 in this case. I don't want to repeat what we said in
19 our brief, but essentially, this case, the gravamen of
20 this case is the contention that FirstEnergy engaged in
21 a bribery scheme and concealed that scheme. In terms of
22 interpreting that in terms of a 10b-5 claim, there are
23 two theories that have been asserted by both the class
24 and the opt-out case.

25 The first is the company made multiple

1 misstatements or statements, I should say, about its
2 political contribution practices, and those statements
3 were all expressly or implied to the effect that the
4 company's political contributions were lawful and
5 legitimate. And the assertion in the 10b-5 cases that
6 those statements were uniformly false because, in fact,
7 the company was engaged in making political
8 contributions in a bribery scheme. In addition to that
9 claim that the statements were false, both complaints
10 also assert if those statements were misleading, because
11 they failed to disclose the truth about the engagement
12 in the bribery scheme.

13 So it is completely wrong for counsel to argue,
14 as he did, that the case cannot be based on omissions.
15 It can be based on omissions, it is based on omissions,
16 in terms of a 10b-5 basic case for presumption of
17 reliance, because we're asserting both of the statements
18 were false and that they were misleading. And that
19 means that the discovery that we had been taking and
20 will take in the future is going to be exactly the same
21 with respect to the basic questions in the case, whether
22 Affiliated Ute is part of the case or not.

23 SPECIAL MASTER JUDGE: That goes to my earlier
24 question that, you know, Chief Judge Marbley said that
25 either the Affiliated Ute applies or Basic applies, but

1 it's just the application of the theory to the same
2 underlying discovery; right?

3 MR. HEIMANN: Precisely.

4 SPECIAL MASTER JUDGE: Yeah, okay. Thank you.

5 Mr. Heimann, you get the gold star today for
6 being concise.

7 MR. HEIMANN: Thank you.

8 SPECIAL MASTER JUDGE: Mr. Giuffra, any
9 response?

10 MR. GIUFFRA: Other than I think what
11 Mr. Heimann said, which is that, you know, how you rule
12 on the class issue should determine how you rule on the
13 opt-outs, we agree with that.

14 SPECIAL MASTER JUDGE: All right. That's easy
15 enough. Thank you. I'm glad we didn't take a break.

16 The motions will be taken under advisement. If
17 the parties would supply me, as you've done in the past,
18 with a copy of the transcript, it will help me a great
19 deal in getting the report and recommendation out. I
20 hope to have a boatload of report and recommendations
21 out and have gifts for everyone in the new year very
22 quickly.

23 Any other matters that we need to attend to or
24 discuss regarding these motions before we discuss last
25 night's email exchanges? Mr. Giuffra?

1 MR. GIUFFRA: No.

2 SPECIAL MASTER JUDGE: Mr. Forge?

3 MR. FORGE: No. Thank you.

4 SPECIAL MASTER JUDGE: All right. Gentlemen,
5 do you want this next portion to be on the record as
6 well, or, I mean, we might as well if we have a court
7 reporter here, I guess.

8 MR. FORGE: Yes. I think that's fine.

9 SPECIAL MASTER JUDGE: Yeah.

10 And, Lena, are you doing okay? Do you want a
11 break?

12 THE REPORTER: I'm okay. Thank you.

13 SPECIAL MASTER JUDGE: All right. Thank you.

14 All right. Last night, I was copied on a
15 series of communications regarding a possible proposed
16 order that the parties were negotiating, which took me
17 by surprise, since I came home from the Ohio State
18 basketball game and found that this was being
19 contemplated. And what made me laugh, as I came back
20 from the game -- let me pull this up -- to finish my
21 preparation for today, and I read that ECF No. 613, the
22 last paragraph of which stated, in relevant part, the
23 order appointing the Special Master did not delegate to
24 Plaintiffs the authority to draft report and
25 recommendations. Plaintiffs point to no authority

1 suggesting that they may draft judicial opinions for the
2 Court or the Special Master. In fact, Courts repeatedly
3 reject this practice as improper.

4 So explain to me why the parties are
5 negotiating a proposed order to clarify an order that I
6 don't think needs clarification.

7 MR. GIUFFRA: I think we were focused on
8 there -- and, by the way, I was glad to see that -- glad
9 to see that Ohio State won yesterday. So it was -- I
10 went to Princeton. Princeton beat Rutgers too.

11 SPECIAL MASTER JUDGE: Nice.

12 MR. GIUFFRA: Yeah. But college basketball --
13 I actually prefer more of the NBA myself.

14 But -- but basically the -- the reference we're
15 making is to the fact that the Plaintiffs, in the issue
16 we're just dealing with, the stay application, had
17 actually drafted up an opinion for you to write a report
18 and recommendation, and we wanted to make the point that
19 we thought that was improper. We're not saying you're
20 going to do it. We just -- that was our way of dealing
21 with it.

22 SPECIAL MASTER JUDGE: Right.

23 MR. GIUFFRA: The only issue we have to deal
24 with now is not -- it's a stipulation of what we're
25 proposing and then you just -- where you could sign it,

1 would be as, I think, we talked at the least hearing
2 when -- when you entered your order on December 19th,
3 which was a question about whether we had to meet and
4 confer and whether things could be filed without your
5 approval, and I raised at the December 21 hearing our
6 concern that we didn't want that to be construed to
7 prohibit Defendants from making a motion if, you know,
8 we actually had a discussion with you and you said, "Why
9 are you filing this stupid motion," and we wanted to do
10 so anyway in order to make a record or preserve an issue
11 for appeal, and then, you know, went back and looked at
12 it, and you said -- and this is at page 43, and this is
13 why it's good to have the transcript of that hearing on
14 the 21st -- you said, quote, "We're going to let you
15 file what you're allowed to file. We're going to let
16 you file what you need to file. We're going to let you
17 file stuff, even if you shouldn't file it and it's
18 strategically dumb. We'll still let you do it, and
19 you're going -- we're going to consider it because
20 that's what I get paid to read it and make a decision
21 best I can," close quote.

22 Now, after that, we then drafted something
23 because there was concern on our end. We wanted to make
24 sure it was actually in an order that we could file
25 motions even to the extent they were authorized by the

1 federal rules, local rules, or the Court's orders. And
2 all we wanted to do was to, you know, make it clear that
3 we could do that. The deadline for us to, you know,
4 file an objection to the order, which at least, on its
5 face, seems to suggest that maybe, you know, we can only
6 file motions, if the Special Master agrees, we can file
7 motions is, I believe, next Tuesday.

8 And so we provided Mr. Forge a draft of this
9 proposed, you know, order. He objected to it, but he
10 did make certain concessions. I mean, what he sort of
11 indicated was, which was sort of consistent with what
12 you said, which is that if we're allowed -- authorized
13 by the federal rules, by the local rules or the Court's
14 orders, we can file something even if, following a
15 conferral process, you don't think we should do it. And
16 so we sent an email to him yesterday and said we were
17 going to raise this issue at today's conference and, you
18 know, that's -- that's really it. We just want to try
19 to, you know, eliminate any question that our ability to
20 file orders -- to file motions, excuse me -- that are
21 allowed for under the federal rules, the local rules, or
22 the -- one of the Court's orders can be filed, even if,
23 you know, following the conferral process, you don't
24 think that's a smart idea for us to file it.

25 The only case -- and I mentioned this the last

1 time -- from when I was a law clerk, and this was a long
2 time ago, there is a very famous case called In Re
3 Martin-Trigona, wherein there was a vexatious litigant
4 and was filing complaints in, you know, all sorts of
5 matters in New York, including in -- in divorce
6 proceedings involving federal judges. And the Courts
7 basically blocked him from filing any more motions
8 without leave. That's, obviously, not what's going on
9 here, and it would be a significant step to prevent a
10 party from filing a motion that it was authorized to
11 file under the federal rules because, during a conferral
12 process, the Special Master said we couldn't do it. So
13 that's all we wanted to clarify.

14 SPECIAL MASTER JUDGE: I think, in our previous
15 status conference, I think I even indicated to you that
16 I'm not going to declare you a vexatious litigator, even
17 if it will shorten my paperwork. But, you know,
18 gentlemen, the meet-and-confer without a -- don't file
19 non-ministerial motions without leave of Court is to get
20 you to talk to me. You know, I indicated in my prior
21 order that, you know, after you meet and confer and talk
22 to one another, you know, then we would talk and that
23 you could file with leave of Court. You don't need to
24 submit to me or should negotiate a proposed order or a
25 stipulation in which I agree to follow the law. That is

1 sort of inherent in the job duties assigned to me by
2 Magistrate Judge Jolson and Chief Judge Marbley.

3 As a Special Master, as I indicated, we are
4 not -- it's not my job, it's not the Court's intent to
5 prohibit you from filing anything. You know, this is
6 the American court system. You could file whatever you
7 want no matter how good, how bad, or how stupid. And it
8 all gets considered. So you don't need that. I don't
9 need to agree to it, because it could not be more
10 implicit in the function of what we're doing here. I'm
11 simply saying talk to one another first, talk to me. I
12 may opine, you know, Counsel, that is the dumbest motion
13 that any human being could ever file in a court case.
14 Have at it. And I will -- I'm not going to tell you no,
15 ever. Because you get to file and litigate your case
16 how you want, but it's simply we're erecting a gateway
17 so you talk to me before you file something.

18 MR. GIUFFRA: I think that obviates the issue.

19 SPECIAL MASTER JUDGE: Good. Thank you.

20 I did get a kick out of the email exchange and
21 the attachments yesterday, and I thought, if nothing
22 else, these gentlemen and these ladies are thorough, you
23 know.

24 Mr. Forge, anything to add?

25 MR. FORGE: No. I never thought it was

1 necessary in the first place, just like you, so --

2 SPECIAL MASTER JUDGE: Oh, don't suck up.

3 Don't suck up now.

4 MR. FORGE: I'm not. I didn't agree to it.

5 This is not my idea, and I thought it was silly, and

6 that's all there is to it.

7 SPECIAL MASTER JUDGE: You know, I think it's

8 unnecessary, but I won't characterize it as silly,

9 because I can see a cautious client saying, what the

10 hell, we can't file something, and an attorney wanting

11 to provide comfort. So --

12 MR. FORGE: Right. Although I do want to -- I

13 do want to raise a related issue.

14 SPECIAL MASTER JUDGE: Yeah.

15 MR. FORGE: And -- and that is, you know, we do

16 have a process in place that requires, you know, once

17 we've met and conferred and then I think it's, you know,

18 the following Monday, the proponent of, you know, that's

19 seeking relief is supposed to provide a position paper.

20 The opponent, by the next Tuesday, at close of business,

21 is supposed to provide it -- their position, and then

22 Wednesday the two are combined and submitted to you.

23 And I -- the one thing I don't want to do is abandon

24 that, because that enables -- that is a written

25 submission. That -- you know, that enables us to

1 present issues, not just for your blessing to file, but
2 hopefully for resolution.

3 SPECIAL MASTER JUDGE: Yeah.

4 MR. FORGE: Obviously, either side could -- you
5 know, whatever side is disappointed could file an
6 objection, but at least -- but we would get, you know,
7 the hope is -- and I think the reason why Magistrate
8 Judge Jolson instituted this originally and then you
9 adapted it into your mandate -- the hope is that these
10 issues can be resolved quickly, not -- not so we have to
11 set up briefing schedules and, you know, initial motions
12 and oppositions and reply briefs and do all of that.
13 The hope is that we can resolve these quickly without
14 having to go through that full-blown process.

15 So the only -- my only comment is I don't want
16 to abandon that process, and I don't want -- I don't
17 want this -- us to, you know, just kind of default into
18 this new procedure, where FirstEnergy sends you a letter
19 and then we talked and you say, well, it doesn't seem
20 like a good idea, but they just go ahead and start a
21 five-week briefing process on a motion that could have
22 been resolved in two days.

23 SPECIAL MASTER JUDGE: No. The ideal in my
24 thought is, you know, eventually, I think that our
25 status conferences, you know, whenever there is no stay

1 in effect, whether it's sooner or later, our status
2 conferences will not necessarily be needed on a weekly
3 basis.

4 When we're going to have one, I want written
5 submissions by the parties, teeing up for me what the
6 agenda would be and what the positions are so we can
7 have a productive -- most productive conference. In the
8 interim, whenever things are either in the off weeks or
9 whenever something comes up that's not on that
10 scheduling that's more of an emergency, just pick up the
11 phone then. But if everybody starts abusing the phone
12 privilege, then we're going to have to have -- you know,
13 just use common sense, but I like the written agenda,
14 the written submission, and we're not going to abandon
15 that, because it's helpful for me, it was helpful for
16 Magistrate Judge Jolson, and, you know, it's helpful
17 just for keeping everything straight in my mind and
18 probably your minds as well. So look at the leave of
19 Court thing as supplementing that, certainly not
20 replacing it.

21 MR. FORGE: Okay.

22 MR. GIUFFRA: We agree that efficiency is
23 important, and we should, you know, try to eliminate all
24 the -- any unnecessary filings and papers.

25 SPECIAL MASTER JUDGE: Great. Good. I like

1 it.

2 All right. Ladies and gentlemen, I think I
3 have more research to do and quite a bit of drafting to
4 do. Let's keep, at least tentatively, next week's
5 conference on the books, because if nothing else, we may
6 have the aftermath of some orders to discuss. It will
7 be subject to being canceled, if it proves unnecessary.
8 If anything comes up in the meantime, in the interim,
9 certainly reach out to me, as our usual course, and we
10 will have an emergency contact, as necessary.

11 Please get the transcript to me as soon as
12 possible, and I will get busy drafting, so you guys can
13 get some decisions here, and report and recommendations
14 upward on the food chain.

15 MR. FORGE: Thank you.

16 MR. GIUFFRA: Thank you very much.

17 SPECIAL MASTER JUDGE: Thank you, all, for your
18 work today.

19 We are off the record.

20 (The proceedings concluded at 9:42 A.M.)

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1 STATE OF CALIFORNIA)
) ss.
2 COUNTY OF ORANGE)

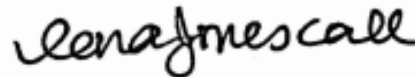
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I, Lena Mescall, Certified Shorthand Reporter,
Certificate No. 13018, for the State of California,
hereby certify:

I am the person that stenographically recorded
the transcript of proceedings held on Thursday,
January 4, 2024.

The foregoing transcript is a true record of
said proceedings.

Dated: January 5, 2024

A handwritten signature in black ink that reads "Lena Mescall". The signature is written in a cursive, flowing style. It is positioned in the center-right area of the page, below the "Dated:" line.

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